Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

NEW HAVEN PROJECTS LIMITED LIABILITY COMPANY,

Petitioner,

v.

CITY OF NEW HAVEN, FIRST UNION NATIONAL BANK, AS TRUSTEE FOR THE NEW HAVEN TLC TRUST 1995-1, and BREEN CAPITAL INVESTMENT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the bankruptcy court correctly rule that factors other than uniformity of assessment should be taken into account in deciding whether the court should exercise its power under 11 U.S.C. § 505(a) to determine the petitioner's real estate tax liability from 1991 to date?

Where the creditors who would derive a benefit from a redetermination of the petitioner's taxes were assignees, and thus stood in the shoes, of the FDIC, did the bankruptcy court correctly exercise its discretion by abstaining from determining petitioner's tax liability under 11 U.S.C. § 505 solely on the ground that those creditors were insiders of the petitioner?

PARTIES TO THE PROCEEDING

The petitioner is New Haven Projects Ltd. Liability Co., a Connecticut limited liability company. Petitioner (who will sometimes be referred to herein as the "Debtor") is the debtor in the underlying bankruptcy proceeding under Chapter 11 of the Bankruptcy Code presently pending in the District of Connecticut as Case No. 34341/96. Petitioner was the appellant in the United States Court of Appeals for the Second Circuit.

Respondent City of New Haven ("City") is a creditor with a claim for unpaid real estate taxes against petitioner. Respondents First Union National Bank, as Trustee for the New Haven TLC Trust 19995-I and Breen Capital Investment Corporation (collectively "Tax Lien Purchasers") are purchasers of tax liens from the City who hold real estate tax claims against petitioner. They were respondents in the bankruptcy court and appellees in the United States Court of Appeals for the Second Circuit.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, New Haven Project Limited Liability Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The Second Circuit opinion (App. A) is reported at 225 F.3d 283 (2d Cir. 2000). The district court order (App. B) and the bankruptcy court opinion (App. C) are unreported.

STATEMENT OF JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on September 20, 2000.

The jurisdiction of this court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional provisions involved in this case.

11 U.S.C. § 505(a) provides:

> § 505. Determination of tax liability
>
> (a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and

whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(2) The court may not so determine — (A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; or (B) any right of the estate to a tax refund, before the earlier of — (i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or (ii) a determination by such governmental unit of such request.

STATEMENT OF THE CASE

A. Procedural History

On September 13, 1996, the Debtor filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code in the Southern District of New York. On December 10, 1996, the case was transferred to the District of Connecticut at New Haven upon the motion of the Tax Lien Purchasers).

On September 15, 1997, the Debtor filed its motion[1] requesting that the bankruptcy court reduce the assessed

1. The motion had first been filed in the Southern District of New York in 1996. When it became apparent that the transfer of the case did not put the motion on the calendar of the Bankruptcy Court for the District of Connecticut, the Debtor re-filed the motion.

valuations of its real estate and thereby determine the allowed claims of the City of New Haven (the "City") and the Tax Lien Purchasers for real property taxes for the tax years 1991-1995 and any claimed interest or penalties.

On August 3, 1998, the bankruptcy court heard argument of the motion, limited to the issue of whether the bankruptcy court should exercise its jurisdiction to hear and determine the motion or whether it should abstain. On September 11, 1998, the bankruptcy court entered and read into the record its decision to abstain (21a-43a).

On September 18, 1998, the Debtor filed a motion, pursuant to Fed. R. Civ. P. 52 and 60, requesting that the bankruptcy court amend its September 11, 1998 order and hear the Appellant's § 505 motion. On October 30, 1998, the bankruptcy court entered an order denying that motion.

The Debtor appealed the bankruptcy court's orders to the United States District Court for the District of Connecticut. That court affirmed the bankruptcy court's orders on May 7, 1999 and entered judgment on September 3, 1999 (17a-20a).

The Debtor then appealed the judgment of the district court to the Second Circuit Court of Appeals, which affirmed the judgment on September 20, 2000 (1a-16a).

The Debtor has filed its plan and disclosure statement. The confirmation hearing has been adjourned pending this petition.

B. Facts

The Debtor's assets consist of five buildings, containing twenty residential units, located in the City of New Haven.[2] For many years prior to this Chapter 11 filing in September 1996, the Debtor and its predecessor in interest incurred substantial operating losses. As set forth on the statements of income and expenses attached as Exhibit "A" to the Debtor's moving papers, before real estate taxes and depreciation, and excluding unusual/non-recurring expenses, the Debtor's properties generated losses from 1991 through 1995 of approximately $584,000.

On the date the petition was filed, the Debtor was in default on notes and mortgages held by the FDIC, as the receiver of New Connecticut Bank and Trust Company. The Debtor also had failed to pay any real estate taxes on the properties since 1991.

In December 1996, i.e., after the Debtor had filed its petition, the William Maidman Trust and the W.M. Maidman Family Limited Partnership (collectively the Maidman creditors), both of which are affiliated with the Debtor and are concededly "insiders" under the Bankruptcy Code, purchased the notes and mortgages covering the Debtor's properties from the FDIC. The Maidman creditors are undersecured to the extent of approximately $700,000, not including interest that has been accruing for approximately 10 years.

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2. The debtor's real properties are located at 1496 Ella T. Grasso Boulevard, 1500 Ella T. Grasso Boulevard., 1508-10 Ella T. Grasso Boulevard., 503-05 Whalley Avenue, 507-09 Whalley Avenue, 511-13 Whalley Avenue, and 515-17 Whalley Avenue, New Haven, Connecticut.

C. The Debtor's Motion under 11 U.S.C. § 505

The Debtor's motion under 11 U.S.C. § 505 for a determination of its real estate tax liabilities since 1991 challenged the validity of the assessed valuation of the properties. In 1991, the City conducted its once every decade revaluation of real property, and more than doubled its assessment of the Debtor's real properties, raising their total valuation from approximately $423,000 to over $980,000. In support of its motion the Debtor submitted appraisals in which the fair market value of the properties in 1991 was found to be $487,500.

D. The Bankruptcy Court's Decision to Abstain

The bankruptcy court found that a determination of the Debtor's real estate tax liabilities would not unduly burden the court; nor would it threaten uniformity of assessments. Nevertheless, the court decided to abstain from exercising the power granted to it under 11 U.S.C. § 505 solely because the Maidman creditors were insiders, and the number and amount of outside unsecured creditors was *de minimus*. The court did not consider whether the Maidman creditors' status as successors to the FDIC required that they be treated as having inherited the FDIC's rights as an outside, undersecured creditor.

E. The Second Circuit's Decision

The Second Circuit held, first, that although uniformity of assessment is one of the factors to be considered in deciding whether to abstain under 11 U.S.C. § 505, it is not the only factor to be considered. In so holding the Second Circuit rejected the holdings of *In re Fairchild Aircraft Corp.*,

124 B.R. 488,491 (Bankr. W.D. Texas 1991) and *In re AWB Asoc*, 144 B.R. 270-277-78 (Bankr. E.D. Pa. 1992), both of which held that uniformity of assessment is the only factor to be considered in deciding whether to abstain under § 505. The court held that (1) the word "may" in § 505 bestowed "merely permissive" authority on the bankruptcy court, (2) the reference in the legislative history of § 505 to abstention being "permitted" where uniformity of assessment is of significant importance "simply clarifies that under the current version of Section 505, a bankruptcy court has the discretion to abstain from redetermining a debtor's tax liability where uniformity of assessment is of significant importance," and (3) an "overwhelming number" of courts have "observed" that § 505 vests the bankruptcy court with "general discretionary authority to redetermine a Debtor's tax liability" (9a-10a).

Second, the court held that although certain factors weighed in favor of the bankruptcy court's exercise of jurisdiction under § 505, the status of the Maidman creditors as insiders, coupled with the absence of any significant outside unsecured creditors, warranted the bankruptcy court's decision to abstain from exercising its power to determine the Debtor's tax liabilities under § 505. The court rejected the argument that under the Financial Institutions Reform and Recovery Act ("FIRREA) and common law principles, the Maidman creditors inherited the FDIC's rights as an outside creditor, dismissing the contention in a footnote, stating:

> While the Maidman Trust certainly acquired the *rights* afforded to the FDIC in relation to the Properties, *see, e.g.*. 12 U.S.C § 1825(2) (1994) (stating that '[n]o property of the corporation [i.e.

> FDIC] shall be subject to levy, attachment, garnishment, foreclosure or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation'), we are aware of no authority for the proposition that the FDIC's outsider *status* constituted an assignable *right. (Emphasis* in original).

(15a, n.3)

Further, the court held that "Section 505 was enacted to protect creditors from the prejudice caused by an ailing debtor's failure to contest tax assessments. * * * It was not enacted to afford debtors a second bite at the apple at the expense of outside creditors" (16a) (citation omitted).

REASONS FOR GRANTING THE WRIT

A. Summary

The Second Circuit's decision with regard to the facts that should influence the bankruptcy court's decision on whether to abstain from determining a debtor's tax liability under 11 U.S.C. § 505 is contrary to the legislative history of the Bankruptcy Code and relies on generalizations in certain bankruptcy court decisions that simply do not warrant the broad reading given the statute by the lower court. The legislative history, as well as sound policy reasons, support reading the statute as permitting abstention under 11 U.S.C. § 505 only where uniformity of assessment would be threatened by the bankruptcy court's determination of the taxes owed by a debtor.

The Second Circuit was also mistaken in dismissing, as trivial, petitioner's argument that the Maidman creditors, even if they are insiders, are entitled under FIRREA and the common law to be treated as outside, undersecured creditors because they are successors to the FDIC. The court's distinction between the FDIC's *rights*, to which the Maidman creditors indisputably succeeded, and the FDIC's *status* as an outside creditor, to which the court held they did not succeed, is contrary to the long-recognized principle that assignees, in general, and assignees of the FDIC, in particular, are treated as having stepped into the shoes of their assignors and thus have all of the "rights *and privileges*" of the FDIC. *Beal Bank, SSB v. Nassau County*, 973 F. Supp. 130, 134 (S.D.N.Y. 1997) (emphasis supplied). This principle is especially applicable to assignees of the FDIC for, as recognized in *Beal*, it is vital that transferees of the FDIC succeed to *all* of the FDIC's rights and privileges in order to enable the FDIC to recoup the maximum possible value for the assets, i.e. loans, of the defunct financial institutions of which it is the receiver. The distinction drawn by the Second Circuit between the FDIC's "status" and its "rights" is squarely in conflict with the policy of maximizing the realizable value of the FDIC's assets because it seriously penalizes persons who are the most obvious potential purchasers of FDIC-held defaulted loans of debtors in bankruptcy, namely, insiders of the debtor who usually have the most stake in keeping the debtor alive, and are, all to frequently, the *only* ones who have any interest in making a deal with the FDIC.

This case thus raises important questions under both the Bankruptcy Code and FIRREA which warrant review by this court.

B. The Decision Below Improperly Resolves A Split Among The Bankruptcy Courts As To The Factors To Be Considered In Deciding To Abstain From Determining A Debtor's Tax Liability Under Bankruptcy Code § 505

Two bankruptcy courts have squarely held that abstention under 11 U.S.C. § 505 is only appropriate if uniformity of assessment is a significant factor.

Thus, in *In re Fairchild Aircraft Corp.*, 124 B.R. 488, 491-92 (Bankr., W.D. Tex. 1991), the court stated:

> The taxing authorities also urge abstention, citing what they believe to be controlling Supreme Court authority. *Arkansas Corp. Commission v. Thompson*, 313 U.S. 132, 142-43, 85 L. Ed. 1244, 61 S. Ct. 888 (1941). They point out that the notice of protest resulted in a formal hearing before the Appraisal Review Board, and that, even though the chapter 11 trustee did not actively participate in this hearing, opting instead for a final adjudication in this forum by filing this motion under Section 505(a), the Board nonetheless made what the taxing authorities now contend should be treated as a binding determination at the conclusion of that hearing. *See Arkansas Corp. Commission, supra* at 143.
>
> *Arkansas Corp. Commission* is not controlling. First of all, the Bankruptcy Act was subsequently amended to overrule that precedent, insofar as it affected post-petition adjudications. *See* Bankruptcy Act, § 2(a); *City of Amarillo v.*

Eakens, 399 F.2d 541, 543 (5th Cir. 1968), *cert. den.,* 393 U.S. 1051, 21 L. Ed. 2d 692, 89 S. Ct. 688 (1969). The statutory language was carried forward into the Bankruptcy Code, with only minor modifications. H.R. Rep. No. 595, 95th Cong., 1st Sess. 356 (1977), 1978 U.S. Code Cong. & Admin. News 5787.

Today, abstention from deciding a tax adjudication question under Section 505 is only appropriate upon a showing that uniformity of assessment is of significant importance. H.R. Rep. No. 595, *supra* at 356; *In re Diez,* 45 Bankr. 137, 139 (Bankr. S.D. Fla. 1984). No such showing has been made here. If the tax *rate* were the subject of this motion, perhaps abstention might be appropriate. Because the trustee only challenges the excessiveness of the appraisal district's valuation of the estate's property, the taxes to be paid by other taxpayers will not be affected, nor will uniformity of assessment be placed in issue (i.e., the overall valuation methodology used by the appraisal district is not being generally attacked). Because uniformity of assessment is not at issue, the taxing [*492] authorities' arguments on this point must be rejected.

In re AWB Associates, G.P., 144 B.R. 270 (Bkrtcy. E.D.Pa. 1992), the court followed *Fairchild* and also emphasized the prejudice to the Debtor that would occur if the court abstained based on the fact that the time for the debtor to have challenged the assessment under State law had passed:

> On the other hand, a decision to abstain would result in significant prejudice to the estate of AWB and ignore one of the primary purposes of 11 U.S.C. § 505. Under New Jersey law, AWB had until August 15th of each tax year through 1992 to file a challenge to the current year's tax assessment. *See* N.J.STAT.ANN. §54:3-21 (West 1992). Since AWB failed to exercise that right under New Jersey Law, it would now be barred from appealing the tax assessments for the years 1985 through 1992 in the New Jersey state tax system. AWB's loss of its right to contest the assessments would therefore result in great prejudice to its estate, since it would be bound by the amount of taxes assessed by Camden.

AWB, 144 B.R. at 276-77.

Fairchild and *AWB* are supported by the legislative history of Bankruptcy Code § 505. See Report of the Committee on the Judiciary, United States Senate, to accompany S.2266, S. Rep No. 95-989, 95th Cong. 2d Sess. (1978) which contains the following discussion of Bankruptcy Code § 505:

> § 505 *Determination of tax liability*
>
> Subsections (a) and (b) are derived, with only stylistic changes, from section 2a(2A) of the Bankruptcy Act. They permit determination by the bankruptcy court of any unpaid tax liability of the debtor that has not been contested before or adjudicated by a judicial or administrative tribunal of competent jurisdiction before the

> bankruptcy case, and the prosecution by the trustee of an appeal from an order of such a body if the time for review or appeal has not expired before the commencement of the bankruptcy case. As under current Bankruptcy Act § 2a(2A), *Arkansas Corporation Commissioner v. Thompson*, 313 U.S. 132 (1941), remains good law to permit abstention where uniformity of assessment is of significant importance.

The Second Circuit's reliance on the "plain meaning" of the word "may" in § 505(a) as signifying a "merely permissive" grant of authority, as contrasted with Congress' use of "shall" in other sections of the Bankruptcy Code when it intended to impose "mandatory requirements" is not appropriate. With all respect, this analysis misses the point. We have never suggested that § 505 imposes a "mandatory requirement" on the bankruptcy court; to the contrary, what is in issue here is what factors should be given weight by the court in exercising its (conceded) discretion under § 505. What the Second Circuit really seems to be saying is that absent some indication in the words of the statute or its legislative history that the discretion to abstain under § 505 should only be exercised when there is a threat to the uniformity of assessment, the word "may" in § 505 permits consideration of any factor reasonably related to the issue of abstention, including, specifically, whether outside creditors would derive any benefit from a redetermination of the debtor's tax liability. And further, that the lack of potential benefit from a redetermination of the debtor's taxes to anyone other than the debtor and its insiders is, in and of itself, sufficient to warrant abstention in this case, ***even though all the other factors bearing on abstention favor the exercise of the court's jurisdiction under § 505.***

There are several flaws in this portion of the Second Circuit's decision.

First, although the statute contains no specific indication that the court's discretion under § 505 is limited, the legislative history indisputably refers only to uniformity of assessment in connection with abstention. The Second Circuit, *ipse dixit,* interpreted the specific reference to uniformity of assessment in the legislative history of § 505 as merely clarifying the discretionary nature of § 505. This was error. As a matter of plain common sense, the specific mention of uniformity of assessment, but no other factor, as bearing on the exercise of discretion by the bankruptcy court impels the conclusion that uniformity of assessment was considered to be the primary, if not the only, factor to be considered.

Second, the Second Circuit relied on a number of cases (an "overwhelming number of courts") which have stated that § 505 confers general discretion on the bankrupty courts to redetermine the tax liability of a debtor. But with only one exception, none of those cases discussed the legislative history of the statute or even mentioned, as an issue, whether the exercise of the court's discretion should depend, only or primarily, on consideration of the possible impact on uniformity of assessment. The *only* case that has specifically rejected the *Fairchild/AWB* analysis (without stating any reason) is *Northbrook Partners, LLP v. Hennepin (In re Northbrook Partners, LLP)*, 245 B.R. 104, 118, n.26 (Bankr. D. Minn. 2000), and even that case did not discuss the reasons for rejection of the *Fairchild/AWB* analysis. Thus, while it is true that many courts have stated that § 505 is discretionary, only one case, without stating any reason, has squarely rejected the Fairchild/AWB conclusion, based on

the legislative history, that discretion under § 505 should be informed only by the threat to uniformity of assessment.

Third, the Second Circuit erred in treating the purpose of § 505 as limited to the protection of outside creditors from the debtor's failure to contest taxes under State or local law. Clearly, the court regarded satisfaction of such purpose as, by far, the most important fact that should control the exercise of discretion under § 505, for in this case, the court noted that "some" of the other factors "favored the exercise of jurisdiction under § 505." In point of fact, *all* of the other factors, such as the lack of complexity of the tax issues, and the fact that redetermination would not be time consuming or burdensome, favored the exercise of jurisdiction, and it was only the fact that there were no outside creditors who would benefit from a redetermination of taxes that was decisive.[3]

The Courts in this district have long exercised jurisdiction under § 505 where the principal benficiary of a redetermination would be the debtor. Thus, in *In re Fashion*

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3. Apparently to demonstrate that there was more than one factor to support abstention, the Second Circuit referred to "two principle (*sic*) reasons" (13a) for the bankruptcy court's decision to abstain, namely (1) the lack of unsecured debt beyond a *de minimus* amount, and (2) the only persons who would benefit from a redetermination would be the Maidman creditors, who were insiders. We think it is fair to characterize these "two principle reasons" as different sides of the same coin and that a fair reading of the bankruptcy court decision and the Second Circuit's decision is that the lack of outside creditors is a decisive factor in abstention decisions under § 505.

Wear Realty Co., 14 B.R. 287 (S.D.N.Y. 1981) (Sofaer, D.J.), the district court, interpreting the predecessors to § 505(a) and § 503(b)(1)(B) under the former Bankruptcy Act, recognized the policy imperatives underlying the bankruptcy court's duty to determine the amount of taxes properly owed on a debtor's property, and reversed the bankruptcy court's decision to abstain from determining large tax claims asserted by the City of New York against the debtor's real property. Those policy goals include the facilitation of debtor rehabilitation and the efficient, orderly and economical administration of the estate through resolution in a single forum of claims that significantly affect the estate. As noted by the district court in *Fashion Wear*, "[b]y refusing to resolve a major — and contested — liability against a debtor, the Bankruptcy Court might well doom any attempt to save the failing enterprise." 14 B.R. at 290.

The district court's articulation of the situation before it in the *Fashion Wear* case is also directly applicable to the circumstances present in this case:

> The tax liability asserted by the City is substantial. Yet the assessments upon which that liability is predicated are hotly and credibly contested. [I]t is unclear whether any forum other than the Bankruptcy Court exists in which Debtor can seek relief form the apparently excessive assessments. Thus, the Bankruptcy Court was obligated, absent some exception to determine the taxes owing on the property.

14 B.R. at 290.

The exercise of jurisdiction under § 505 is particularly appropriate here. As stated in the Debtor's motion, the assessed value of the Properties ranges from nearly twice to over three times the Properties' fair market value during the period in question. No better case could be found for not saddling the Debtor with a grossly excessive assessment for tax purposes.

Finally, the Second Circuit also erred in treating the Debtor's motion as a "second bite of the apple." Indeed, the court's use of that phrase is totally inexplicable. It is undisputed that the Debtor did *not* avail itself of its right to challenge the assessment in the Connecticut courts. The text of § 505(a)(2) specifically bars relief under § 505(a)(1) only if the tax "was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title." It just could not be clearer that Congress did not intend to preclude debtors who failed to avail themselves of nonbankruptcy remedies to challenge taxes from seeking relief under 11 U.S.C. § 505. Indeed, the lack of prior action is a reason to grant the motion — not to deny it.

We submit that although the lack of outside creditors may be a legitimate issue in determining some issues under the Bankruptcy Code, such as the utility of a Chapter 11 proceeding, a debtor whose right to be in bankruptcy has not been contested has a cognizable interest in the fair determination of its tax liability by the bankruptcy court that cannot be ignored by a court deciding whether to abstain under § 505. Certainly where, as here, the legislative history of the statute indicates that Congress was primarily concerned with preserving the uniformity of assessment, the word "may" in § 505(a) should not be read as justifying the bankruptcy

court's absention simply because the only person to benefit from a redetermination of taxes would be the debtor, or its insiders.

C. The Maidman Creditors, As Assignees Of The FDIC, Should Be Regarded As Having The Same Right As The FDIC Would Have Had To Request A Redetermination Of The Debtor's Taxes Under 11 U.S.C. § 505

It has long been public policy to put the interests of the FDIC ahead of others. *See, e.g., D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942) (holding as a matter of public policy that the FDIC would not be held to an agreement between a bank and a maker of a note that the note would not be enforced). Consistent with this long-standing public policy, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act, which granted special privileges to the FDIC, such as protection against foreclosure. *See, Beal Bank, infra.* As discussed below, in order to further the public policy goals of the FDIC, namely the strengthening of the banking system through the seizure of failing banks and the orderly disposition of their assets, assignees of the FDIC are cloaked with all of the FDIC's rights and privileges. Thus, as the FDIC was an outside creditor of the Debtor with the right to benefit from a § 505 motion, the Maidman creditors, as the FDIC's successors, must likewise be deemed outside creditors with the same right. The bankruptcy court thus erred in considering the FDIC's successors as inside creditors and for that reason, abstaining from determining the motion.

It is undisputed that the Maidman creditors acquired the notes and mortgages from the FDIC. It is horn book law that

an assignee takes all of the rights of an assignor, no more and no less. *Beal Bank, SSB v. Nassau County*, 973 F. Supp. 130, 134 (S.D.N.Y. 1997). Where the assignor is the FDIC, the rights transferred include the benefit of banking regulations. *Id.* (citing *Federal Savings & Loan Ins. Corp. v. Griffin*, 935 F.2d 691, 698 (5th Cir. 1991) and *In Re: Woodstone Limited Partnership*, 149 B.R. 294, 297 (E.D.N.Y. 1993).

Thus, in *Beal Bank*, the court held that the rights afforded to the FDIC by 12 U.S.C. § 1825(b)(2), which states that FDIC property is not subject to foreclosure, run to the FDIC's assignee as well. Accordingly, the court voided the tax foreclosure sale of property acquired by Beal Bank from the FDIC. *Beal Bank*, 973 F. Supp. at 134. The court wrote:

> Beal Bank became a successor in interest after purchasing the mortgage from the FDIC. Accordingly, Beal Bank is entitled to assert all rights and privileges that the FDIC would have been permitted to rely upon. As a result of having concluded that the FDIC was entitled to rely upon § 1825 (b)(2) to prevent foreclosure of the property, it is the opinion of this Court that Beal Bank may rely on this provision to have the tax deed declared void. Moreover, to find otherwise would undermine the entire purpose of § 1825 (b)(2) because providing the FDIC's successors in interest with less rights than the FDIC would effectively deprive the FDIC of the ability to market loans it takes over in order to recoup whatever funds it can. Congress' purpose in creating the Financial Institutions Reform, Recovery and Enforcement Act would be

> frustrated if the FDIC's lien protections disappeared as soon as the FDIC attempted to sell its property interests.

Id.

The Second Circuit's relegation of *Beal* to nothing more than a generalization as to the rights (as opposed to the status) acquired by an assignee of the FDIC ignores both the language of *Beal* and the policy considerations underlying Beal, as well as the Second Circuit's own decision in *Federal Deposit Ins. Corp. v. Four Star Holding Co.*, 178 F.3d 97 (2d Cir. 1999).

In *Beal*, in the passage quoted above, the court expressly referred to the right of an assignee of the FDIC "to assert all rights and *privileges*" (emphasis added) of the FDIC. The Second Circuit noted the same passage, but ignored the word "privileges." Common sense suggests that there is no difference between "rights" that flow from the FDIC's "status" and the FDIC's "privileges." Moreover, and most tellingly, the policy considerations relied upon in *Beal* to clothe the assignee with the rights and privileges of the FDIC, namely the maximization of the amounts the FDIC can recoup on the assets of failed institutions (i.e. bad loans), apply with exactly the same force here as they did in *Beal*. Thus, insiders are, all too frequently, the only people interested in any deal with the FDIC for a debtor's defaulted loan. Obviously, if the FDIC is in a position to transfer its right, as an outside undersecured creditor, to seek a tax determination under 11 U.S.C. § 505 it can strike a better deal with the debtor than otherwise would be the case. Under the *Beal* analysis that is the strongest possible reason to interpret the FDIC's right to seek relief under the statute as assignable and now possessed by the Maidman creditors.

The Second Circuit's decision in *Four Star* is a perfect illustration of why the court's distinction between the FDIC's status and its assignable rights is untenable. In *Four Star* the court ruled that the federal courts retain jurisdiction over a case involving a loan in which the FDIC was originally named as a party, even after the FDIC assigned the loan. In other words, the assignee of the FDIC was entitled take advantage of the statute entitling the FDIC to have its cases heard in federal court. The court quoted with approval the following passage from the Fifth Circuit in *Federal Sav. & Loan Ins. Corp. v. Griffin*, *supra*: "[T]he 'policy reasons for insuring federal jurisdiction over cases involving the actions of failed thrifts continue when the FDIC is [no longer a party to the case]. A transferee from FSLIC or FDIC as successor of their interests, is still entitled to the protection of the federal courts.' " *Griffin*, 935 F.2d at 966.

In both *Four Star* and *Griffin* the courts could easily have ruled that federal jurisdiction depended on the FDIC's "status," and that such status was not assignable. Yet, they did not, because of the policy of maximizing the FDIC's ability to recoup the value of bad loans with which it was saddled. And since those policy considerations are equally applicable here, the Maidman creditors, as the FDIC's assignee, should be considered to have the same rights to rely on § 505 as the FDIC, whether or not they are inside creditors.

CONCLUSION

For all the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE MITTELMAN
Counsel of Record
MAIDMAN AND MITTELMAN, LLP
Attorneys for Petitioner
70 East 55th Street
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APPENDIX

APPENDIX A — AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED SEPTEMBER 14, 2000 AND AMENDED SEPTEMBER 20, 2000

AMENDED OPINION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: April 20, 2000 Decided: September 14, 2000
Amended: September 20, 2000)

Docket No. 99-5073

In re: NEW HAVEN PROJECTS LTD. LIABILITY CO.,

Debtor.

NEW HAVEN PROJECTS LTD. LIABILITY CO.,

Debtor-Appellant,

— v. —

CITY OF NEW HAVEN, FIRST UNION NATIONAL BANK, as Trustee for the New Haven TLC Trust 1995-1, and BREEN CAPITAL INVESTMENT CORPORATION,

Appellees,

Appendix A

UNITED STATES TRUSTEE,

Trustee.

Before:

SOTOMAYOR and KATZMANN,

*Circuit Judges.**

* * *

SOTOMAYOR, *Circuit Judge*:

Appeal from an order of the United States District Court for the District of Connecticut (Warren W. Eginton, *Judge*) affirming a decision of the United States Bankruptcy Court for the District of Connecticut (Albert S. Dabrowski, *Bankruptcy Judge*). The bankruptcy court declined to conduct a redetermination of tax liability as permitted under 11 U.S.C. § 505 for a debtor in bankruptcy proceedings. Debtor-appellant argues that the bankruptcy court is required to conduct such a review except under a certain narrow range of circumstances not present here. Debtor-appellant further argues that even if the bankruptcy court were to have broader discretion in deciding when to conduct a Section 505 review,

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* The Honorable Ellsworth A. Van Graafeiland was originally assigned as a member of the panel but, due to illness, did not attend oral argument or participate in the disposition of this appeal. The appeal is being determined by the remaining members of the panel, who are in agreement. *See* 2d Cir. R. § 0.14(b); *Murray v. National Broad. Co.*, 35 F.3d 45, 46 (2d Cir. 1994).

the court in this case relied upon an erroneous finding in reaching its decision, treating the only party likely to benefit from Section 505 review as an insider creditor. Rejecting both of these contentions, we affirm.

BACKGROUND

The facts relevant to the instant appeal are not disputed by the parties. On December 17, 1987, New Haven Projects No. 1 Corporation ("NHP Corp.") was organized under the laws of Connecticut with Mitchel Maidman as its president and director. In August 1988, NHP Corp. conveyed several real properties in New Haven, Connecticut ("the Properties") to another entity, New Haven Associates Limited Partnership ("NHP Partnership"), whose general partners were Richard Maidman and NHP Corp.

Following its acquisition of the Properties, NHP Partnership obtained mortgages secured by the Properties from the New Connecticut Bank and Trust Company. Shortly thereafter, the Federal Deposit Insurance Corporation ("FDIC") exercised receivership over the bank and became the creditor for the Properties' mortgages.

In 1991, the City of New Haven ("City") reassessed the value of NHP Partnership's Properties pursuant to Conn. Gen. Stat. § 12-62 (1993) to determine the market value of real estate for the purpose of levying property taxes. The City increased its assessment of the Properties from approximately $423,000 to over $980,000, and for the years 1991-1995, the City levied taxes based on the new assessment. NHP Partnership made no effort to contest the

City's new tax assessment within the one year statute of limitations imposed by Connecticut law. *See* Conn. Gen. Stat. § 12-119 (1993). NHP Partnership then failed to pay these property taxes for the period 1991-1995. The City filed liens against the Properties and later transferred its rights under the tax liens to two entities, First National Bank as Trustee for the New Haven TLC Trust 1995-1 and Breen Capital Investment Corporation ("the Tax Lien Purchasers").

On September 11, 1996, debtor-appellant New Haven Projects, LLC ("Debtor") was formed under the laws of Connecticut with Scott Hurwitz as its resident agent. Debtor's address was given as 432 East 87th Street, New York City, the same office address given for Mitchel Maidman and Richard Maidman at the time NHP Corp. and NHP Partnership were formed. According to the record, NHP Corp. owned 99% of Debtor with the remaining 1% interest owned by New Haven Surplus, LLC ("New Haven Surplus"), a Connecticut LLC, also with Scott Hurwitz as its resident agent.

On September 12, 1996, one day after Debtor was formed, NHP Partnership conveyed the Properties to Debtor. The following day, September 13, 1996, Debtor filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. On December 10, 1996, the case was transferred to the United States Bankruptcy Court for the District of Connecticut. Finally, on December 16, 1996, the FDIC assigned its mortgages against the Properties to another entity, the W.M. Maidman Family Limited Partnership ("Maidman Trust"), also located at 432 East 87th Street, New York City.

Appendix A

Debtor's bankruptcy petition listed several unsecured creditors presenting a total of less than $8,000.00 in claims, representing at most approximately one half of a percent of the debt structure of Debtor.

On September 15, 1997, Debtor moved the bankruptcy court to review and reduce its tax liability for the period 1991-1995 pursuant to 11 U.S.C. § 505(a) (1994), and to determine tax liability for the period following the filing of the bankruptcy petition pursuant to 11 U.S.C. § 503(b)(1)(B) (1994). The bankruptcy court declined to conduct a Section 505 review, however, finding that the claims of the unsecured creditors were *de minimis*, failing to justify Section 505 review, and that the secured creditor Maidman Trust was an insider creditor, and, along with the Maidman family, controlled Debtor and its predecessors such that any reduced tax assessment would result in a windfall to Debtor and its affiliates at the expense of the City and the Tax Lien Purchasers.

On May 7, 1999, the district court affirmed the bankruptcy court's decision and this appeal followed.

DISCUSSION

Reviewing this matter on appeal, "[t]he district court's order affirming the bankruptcy court is 'subject to plenary review.' " *Tudisco v. United States* (*In re Tudisco*), 183 F.3d 133, 136 (2d Cir. 1999) (quoting *Shugrue v. Air Line Pilots Ass'n, Int'l* (*In re Ionosphere Clubs, Inc.*), 922 F.2d 984, 988 (2d Cir. 1990)). Accordingly, we review conclusions of law *de novo* and findings of fact for clear error. *Id.*

Appendix A

Debtor challenges the bankruptcy court's decision to abstain from redetermining the value of the Properties pursuant to 11 U.S.C. § 505, which defines the parameters of a bankruptcy court's jurisdiction to determine a debtor's tax liability as follows:

> (a)(1) Except as provided in paragraph (2) of this subsection, *the court may determine the amount or legality of any tax*,[1] any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.
>
> (2) The court may not so determine —
>
> > (A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title . . . .

11 U.S.C. § 505(a) (1994) (emphasis added).

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1. The phrase "any tax" encompasses both federal and state tax liabilities, including state real property taxes, state sales taxes, city *ad valorem* taxes, federal income taxes, and federal employment taxes. *See In re Galvano*, 116 B.R. 367, 372 n.6 (Bankr. E.D.N.Y. 1990) (citing cases).

Appendix A

Subject to certain limitations, § 505 empowers a bankruptcy court to redetermine the amount of a debtor's tax liability even when a debtor has failed to comply with state law procedures for challenging such liabilities, including applicable state law statutes of limitations. See *In re Piper Aircraft Corp.*, 171 B.R. 415, 418 (Bankr. S.D. Fla. 1994); *see also Metropolitan Dade County v. Kapila* (*In re Home and Housing of Dade County, Inc.*), 220 B.R. 492, 494-95 (S.D. Fl. 1998) (stating that under 11 U.S.C. § 505, "[t]he debtor is given a renewed opportunity to contest the amount due for taxation, and the bankruptcy court is not bound by time limits to determine the amount of taxes applicable in any other forum"); *In re 499 W. Warren Street Assocs. Ltd.*, 143 B.R. 326, 329 (Bankr. N.D.N.Y. 1992) (same). As one bankruptcy court has explained:

> The broad grant of jurisdiction contained in § 505 makes no reference to time periods imposed by state law. . . . [A] debtor as representative of the bankruptcy estate is allowed to contest tax debts in the bankruptcy court even though his prior inaction would bar him from contesting them elsewhere. This is permitted on the ground that taxes with their priority impose a special problem for creditors, and creditors should not be prejudiced by a debtors's inaction.

Ledgemere Land Corp. v. Ashland (*In re Ledgemere Land Corp.*), 135 B.R. 193, 196-97 (Bankr. D. Mass. 1991).

Debtor argues that the bankruptcy court in this case was required to redetermine its tax liability under § 505.

Appendix A

According to Debtor, a court may abstain from making such a redetermination only upon a showing that uniformity of tax assessments is of significant importance to the governmental entities involved. While all parities agree that the need to maintain a uniformity of tax assessments may certainly be considered by a court in determining whether to reassess taxes under § 505, the dispute here surrounds whether a court may, in its discretion, consider additional factors when deciding whether to conduct a § 505 redetermination of tax liability.

In support of its interpretation of Section 505, Debtor relies upon two bankruptcy court cases, *In re Fairchild Aircraft* and *In re AWB Associates*. In *Fairchild Aircraft*, the bankruptcy court stated that

> abstention from deciding a tax adjudication question under Section 505 is only appropriate upon a showing that uniformity of assessment is of significant importance. No such showing has been made here. If the tax rate were the subject of this motion, perhaps abstention might be appropriate. Because the trustee only challenges the excessiveness of the appraisal district's valuation of the estate's property, the taxes to be paid by other taxpayers will not be affected, nor will uniformity of assessment be placed in issue (i.e., the overall valuation methodology used by the appraisal district is not being generally attacked).

In re Fairchild Aircraft Corp., 124 B.R. 488, 491 (Bankr. W.D. Tex. 1991) (citations omitted). The bankruptcy court

in *In re AWB Assoc.*, 144 B.R. 270, 277-78 (Bankr. E.D. Pa. 1992), later quoted approvingly from the same opinion, finding "that the correct analysis of the abstention issue is thusly enunciated in *Fairchild Aircraft*." *Id.* at 276. Debtor relies, therefore, on the explicit language of these cases that "abstention from deciding a tax adjudication question under Section 505 is *only* appropriate upon a showing that uniformity of assessment is of significant importance." *Fairchild Aircraft*, 124 B.R. at 491 (emphasis added); *AWB*, 144 B.R. at 276 (quoting *Fairchild Aircraft*, 124 B.R. at 491).

To the extent that *Fairchild Aircraft* and *AWB* hold that a bankruptcy court's jurisdiction under Section 505 is mandatory in the absence of "uniformity of assessment" concerns, we firmly reject this interpretation of the statute. To understand why, we look first to the plain language of the statute that provides that "the court *may* determine the amount or legality of any tax . . . ." 11 U.S.C. § 505(a)(1) (emphasis added). This Court has observed that "[t]he verb 'may' generally denotes a grant of authority that is merely permissive." *International Cablevision, Inc. v. Sykes*, 997 F.2d 998, 1005 (2d Cir. 1993). We are persuaded that the ordinary meaning of the word "may" applies here because nothing in § 505 suggests otherwise and because Congress elsewhere in the Bankruptcy Code has chosen the word "shall" to denote mandatory requirements. *Compare* 11 U.S.C. § 505(a)(1) (1994) ("the court *may* determine . . .") (emphasis added), *with* 11 U.S.C. § 503(b) (1994) ("After notice and a hearing, there *shall* be allowed administrative expenses . . . .") (emphasis added). As the Supreme Court has explained, "[i]t is generally presumed that Congress acts intentionally and purposely when it includes particular

language in one section of a statute but omits it in another." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994).

Second, contrary to Debtor's contention, nothing in the legislative history of Section 505 favors the interpretation articulated by the *Fairchild Aircraft* court. Subsections (a) and (b) of § 505 were

> derived, with only stylistic changes, from section 2a(2A) of the Bankruptcy Act [section 11(a)(2A) of former Title 11] . . . . As under Bankruptcy Act [former] section 2a(2A), *Arkansas Corp. Comm'n v. Thompson*, 313 U.S. 132 (1941), remains good law to *permit* abstention where uniformity of assessment is of significant importance.

11 U.S.C.A. § 505, Historical and Statutory Notes at 723 (1993) (emphasis added). In our view, this language simply clarifies that under the current version of Section 505, a bankruptcy court has the discretion to abstain from redetermining a debtor's tax liability where uniformity of assessment is of significant importance.

Finally, we note that an overwhelming number of courts have observed that § 505(a)(1) vests the bankruptcy court with general discretionary authority to redetermine a debtor's tax liability. *See, e.g., In re Onondaga Plaza Maintenance Co.*, 206 B.R. 653, 656 (Bankr. N.D.N.Y. 1997) (stating that a court's authority under Section 505 is "discretionary"); *In re Marcellus Wood & Trucking, Inc. v. Michigan Employment Sec. Comm'n* (*In re Marcellus Wood & Trucking, Inc.*), 158 B.R. 650, 654 (Bankr. W.D. Mich. 1993)

(same); *In re Swan*, 152 B.R. 28, 30 (Bankr. W.D.N.Y. 1992) (same); *AWB*, 144 B.R. at 275-76 (same); *Queen v. United States* (*In re Queen*), 148 B.R. 256, 259 (S.D.W. Va. 1992) (same); *El Tropicano, Inc. v. Garza* (*In re El Tropicano, Inc.*), 128 B.R. 153, 161 (Bankr. W.D. Tex. 1991) (same); *Galvano*, 116 B.R. at 372 (same).

Therefore, based on the plain language of the statute, its legislative history, and relevant case law, we interpret the verb "may" in 11 U.S.C. § 505(a)(1) as vesting the bankruptcy court with discretionary authority to redetermine a debtor's taxes. This authority is not limited solely to instances where uniformity of tax assessments is of significant importance. *See Northbrook Partners, LLP v. Hennepin* (*In re Northbrook Partners, LLP*), 245 B.R. 104, 118 n.26 (Bankr. D. Minn. 2000) ("The *Fairchild Aircraft Co.* court was correct in recognizing that abstention under § 505(a) is appropriate where 'uniformity of assessment is of significant importance.' *It was not correct in holding that abstention is appropriate only then.*") (emphasis added).

The exercise of such discretion is, of course, subject to the explicit limitations in Section 505 itself, and must be informed by the purpose underlying the statute. Specifically, in determining whether to abstain from redetermining tax liability in a given case, a court must

> assure itself that the legislative purpose for drafting this provision, namely to protect the interests of both debtors and creditors, is met. Creditors are entitled to protection from the "dissipation of an estate's assets" in the event that

> the debtor failed to contest the legality and amount of taxes assessed against it. Having the bankruptcy court adjudicate the matter may also afford an alternative forum for proceedings that might otherwise delay the orderly administration of the case and distribution to the debtor's creditors.

Onondaga, 206 B.R. at 656 (citations and internal quotations omitted). *See also City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122, 125 (10th Cir. 1990) (stating that § 505 serves to protect "creditors from the dissipation of the estate's assets which could result if the creditors were bound by a tax judgment which the debtor, due to his ailing financial condition, did not contest." (citations and internal quotation marks omitted)); *Piper Aircraft*, 171 B.R. at 418 (*quoting Ledgemere Land*, 135 B.R. at 196-97); *AWB*, 144 B.R. at 277-78.[2]

In light of these important considerations, bankruptcy courts have properly looked to a number of factors when deciding whether to exercise their authority under 11 U.S.C. § 505, including (1) the complexity of the tax issue; (2) the

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2. Congress has also built into Section 505 "certain safeguards to protect states from unwarranted federal intrusion." *In re Super Van, Inc.*, 161 B.R. 184, 192 (Bankr. W.D. Tex. 1993). For example, if the amount or legality of a tax was contested before and adjudicated by any judicial or administrative tribunal of competent jurisdiction before the commencement of the bankruptcy case, then relief under Section 505 is not available. *See* 11 U.S.C. § 505(a)(2)(A). *See also Northbrook Partners*, 245 B.R. at 118 (recognizing the need to weigh the goals of promoting bankruptcy relief against the state's interest in applying and enforcing its own law).

need to administer the bankruptcy case in an expeditious fashion; (3) the burden on the bankruptcy court's docket; (4) the length of time necessary to conduct the hearing and to render a decision thereafter; (5) the asset and liability structure of the debtor; and (6) the potential prejudice to the debtor, the taxing authority, and creditors. *See Northbrook*, 245 B.R. at 118; *In re D'Alessio*, 181 B.R. 756, 759-60 (Bankr. S.D.N.Y. 1995); *AWB*, 144 B.R. at 276; *Galvano*, 116 B.R. at 372.

Applying a similar analysis to the case before us, the bankruptcy court noted that some factors favored the exercise of jurisdiction under § 505, namely that the tax issues involved were not complex, (A 29) and that redetermination of tax liability would not be overly time-consuming or burdensome for the bankruptcy court. The bankruptcy court elected to abstain from engaging in a § 505 review, however, for two principle reasons. First, the court observed that the amount of unsecured debt was "*de minimis*." Second, the court determined that

> [w]hat the Debtor is requesting in this case . . . would only benefit the Debtor and [its] affiliates and insiders and the real controlling interest, the Maidmans and Maidman Trust.
>
> That benefit . . . would be an inappropriate windfall at great expense to the City and to the Tax Lien Purchasers.
>
> The motion not only does not advance . . . what the court views to be the primary purpose

> underlying the enactment of Section 505, it serves no purpose contemplated by Section 505 and, indeed, in this Court's view, defies the spirit of that statute and visits undue prejudice on the responding parties.

As an initial matter, we note, as did the bankruptcy court, that certain factors counsel in favor of § 505 review. We also agree with the bankruptcy court's conclusion that the unsecured creditors would not meaningfully benefit from Section 505 review because their claims, totaling less than $8,000, are *de minimis*. Finally, based on the interrelationship between the Maidman Trust, the Maidman family members, Debtor, and Debtor's affiliates, we find no clear error in the bankruptcy court's factual finding that the Maidman Trust should be treated as an insider of Debtor. To support its finding, the bankruptcy court explained that

> the Maidmans and/or the Maidman Trust control the Debtor, its members, controlled the Debtor's predecessors and its members, and have exercised full and complete control over those entities since their inception. . . .
>
> [T]heir hand and footprints are found throughout and all over these entities. They formed and controlled the Debtor's predecessor; they formed and controlled the Debtor's members or they are the Debtor's members. . . . They, through the exercise of that control, created the Debtor itself. The next day, the day following the creation of the Debtor, they provided the Debtor or facilitated

> the provision to the Debtor of all of its assets including specifically the [ ] Properties in this case . . . .
>
> They then caused by virtue of their control a [Section] 505 motion to be filed with this court whose obvious purpose was to seek to advantage themselves of the monetary benefit that would flow from the granting of that motion and which the Court finds would create a six-figure windfall to the Debtor, to the Debtor's affiliates, insiders, and to the related controlling parties and entities which I referred to as the Maidmans and the Maidman Trust.[3]

Based on these findings, it is clear that an insider creditor — the Maidman Trust — is the only party that would likely

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3. Debtor also contends that the Maidman Trust must, as a matter of law, be deemed an outsider creditor of Debtor because, as a successor to the FDIC, it is "cloaked with all of the FDIC's rights and privileges," including the right to outsider status. Appellant's Br. at 11-13 (citing *Beal Bank, SSB v. Nassau County*, 973 F. Supp. 130 (E.D.N.Y. 1997)). The case cited by Debtor, however, stands merely for the unremarkable proposition that "an assignee takes all of the *rights* of the assignor, no greater and no less." *Beal Bank*, 973 F. Supp. at 134. While the Maidman Trust certainly acquired the *rights* afforded to the FDIC in relation to the Properties, *see, e.g.*, 12 U.S.C. § 1825(b)(2) (1994) (stating that "[n]o property of the Corporation [i.e. FDIC] shall be subject to levy, attachment, garnishment, foreclosure or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation"), we are aware of no authority for the proposition that the FDIC's outsider *status* constituted an assignable *right*.

benefit from Section 505 review. At the same time, a reassessment of the Properties would threaten to prejudice the Tax Lien Purchasers and the City of New Haven as outside creditors. Section 505 was enacted to protect creditors from the prejudice caused by an ailing debtor's failure to contest tax assessments. *See, e.g., City Vending of Muskogee*, 898 F.2d at 125; *Piper Aircraft*, 171 B.R. at 418; *AWB*, 144 B.R. at 277. It was not enacted to afford debtors a second bite at the apple at the expense of outside creditors. Because the exercise of Section 505 review in this case would frustrate the purpose of the statute, we affirm the bankruptcy court's decision to abstain from redetermining Debtor's tax liability.

CONCLUSION

We have considered Debtor's arguments and find them to be without merit. Accordingly, the district court order affirming the bankruptcy court's decision is affirmed.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED SEPTEMBER 3, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

3:98CV2401 WWE

In Re: NEW HAVEN PROJECTS LIMITED LIABILITY COMPANY

NEW HAVEN PROJECTS LIMITED LIABILITY COMPANY,

Appellant

v.

CITY OF NEW HAVEN, FIRST UNION NATIONAL BANK AS TRUSTEE FOR THE NEW HAVEN TLC TRUST 1995-1, BREEN CAPITAL INVESTMENT CORP.

Appellee

JUDGMENT

This cause came on for consideration on appellant's appeal of the Bankruptcy Court's decision and order abstaining from exercising its jurisdiction to hear and determine debtor's motion for an order reducing the assessed valuation on debtor's property and the taxes assessed by the

Appendix B

City of New Haven relating thereto, by the Honorable Warren W. Eginton, Senior United States District Judge,

The Court having considered the motion and all the papers submitted in connection therewith filed its Order affirming the Bankruptcy Court's decision,

It is therefore ORDERED and ADJUDGED that the Bankruptcy Court's order is affirmed and the appeal is dismissed.

Dated at Bridgeport, Connecticut, this 3rd day of September, 1999.

KEVIN F. ROWE, Clerk

By s/ [illegible]
Deputy-in-Charge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED MAY 7, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Chapter 11
3:98CV2401 (WWE)

In Re: NEW HAVEN PROJECTS LIMITED LIABILITY COMPANY,

Debtor

NEW HAVEN PROJECTS LIMITED LIABILITY COMPANY,

Appellant

v.

CITY OF NEW HAVEN, FIRST UNION NATIONAL BANK AS TRUSTEE FOR THE NEW HAVEN TLC TRUST 1995-1, BREEN CAPITAL INVESTMENT CORP.,

Appellees

ORDER

The Court, having done its own research, and having read thoroughly the entire record and moving papers in this case hereby AFFIRMS the Decision and Order Abstaining From Exercising Its Jurisdiction To Hear and Determine

Appendix C

Debtor's Motion For An Order Reducing the Assessed Valuation on Debtor's Property and the Taxes Assessed By the City of New Haven Relating Thereto, for the reasons set forth in the well-reasoned Decision and Order of the Bankruptcy Court.

SO ORDERED

s/ Warren W. Eginton
WARREN W. EGINTON
SENIOR UNITED STATES
DISTRICT JUDGE

Dated at Bridgeport, Connecticut this 7th day of May, 1999.

APPENDIX D — TRANSCRIPT OF HEARING OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF CONNECTICUT ON MOTION TO REDUCE THE ASSESSED VALUATION ON THE DEBTOR'S PROPERTY AND THE TAXES RELATING THERETO DATED SEPTEMBER 11, 1998

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF CONNECTICUT

Chapter 11
No. 96-34341

In the Matter of:
NEW HAVEN PROJECTS, LLC,

Debtor.

HEARING ON
#21 MOTION TO REDUCE THE ASSESSED VALUATION ON THE DEBTOR'S PROPERTY AND THE TAXES RELATING THERETO;
#29 OBJECTION TO #21;
#47 OBJECTION TO #21

Held Before
The Hon. ALBERT S. DABROWSKI
Bankruptcy Judge
September 11, 1998

* * *

Appendix D

[3] THE CLERK: New Haven Projects, Limited.

THE COURT: Good morning.

VOICES: Good morning.

THE COURT: If you would just bear with me for a second.

As the courtroom Deputy just announced, this is the New Haven Projects, Limited Liability Company. It is Case Number 96-34341. More specifically, it is Document ID Number 21 and the related objections thereto, Document ID Numbers 29 and 47.

Can I have the appearances of counsel for the record, first from those appearing on court physically, please?

MR. CAPLAN: Stuart Caplan from The Marcus Law Firm on behalf of First Union National Bank as Trustee for —

MR. KARASIK: Hello.

THE COURT: All right. Is this Mr. Karasik?

MR. KARASIK: Yes, Howard Karasik.

THE COURT: All right. Hang on for a second.

[4] MR. KARASIK: Sure.

THE COURT: First of all, Mr. Caplan, could you speak up?

MR. CAPLAN: Yes, sir. Stuart Caplan from The Marcus Law Firm on behalf of First Union National Bank as Trustee for the New Haven TLC Trust.

MS. SCOFIELD: Marylou Scofield from Corporation Counsel for the City of New Haven on behalf of the City of New Haven.

MR. KARASIK: Hello.

THE COURT: All right. Could I have the appearance of counsel, please, for the New Haven Projects, Limited Liability Company?

MR. KARASIK: Howard Karasik of Sherman, Citron and Karasik.

THE COURT: Mr. Karasik, I gather you didn't hear the appearances that were just placed on the record?

MR. KARASIK: I did not, your Honor.

THE COURT: Can you hear me?

MR. KARASIK: Yes, I can, your [5] Honor.

THE COURT: All right. Those appearances were specifically Mr. Caplan and Ms. Scofield, representing respectively the tax lien purchasers and the City of New

Haven or the tax lien purchasers as you know them, and that was all that was said on the record as they entered their appearances. They are here in court; you are participating telephonically, as you were invited to do so by the Court.

Since the purpose of this hearing is for the Court to place on the record its ruling with regard to your motion, it's obviously critical that you're able to hear me. I do not anticipate at this time there will be any further comment by any counsel. If there is comment, I'll make sure that you, Mr. Karasik, can hear whatever that comment is.

All right. As the Court indicated, this is New Haven Projects, Limited Liability Company. It's Case Number 96-34341.

As the parties know, there was [6] a hearing held on the motion that I referred to and which I will particularize hereafter on August 3rd of 1998. Since that hearing, I have examined the files and records of the case, the voluminous exhibits that were submitted to the Court including those exhibits that were submitted in the form of the notebook in organized fashion, which the Court is appreciative of, the organized fashion of the submission, and, of course, the motions and related briefs that were filed as well as my notes of the oral argument on August 3rd of 1998.

I would have preferred in this case to issue a written decision. That is my general preference in all matters. I nevertheless, however, self-imposed a mid-September date for the Court's ruling initially in view of the parties' request for a September hearing date, or it might be more accurate

to say in view of the parties' observation that they could be ready in late September for a hearing date if such a hearing was in fact and indeed necessary.

A written decision, quite [7] frankly, in view of my schedule and my propensity to detail them would be many months in the making because of the burdensome number of other matters that are before the Court.

I render this oral ruling today viewing the solemnity with which I act on this matter to be important and an integral part of the decision-making process.

The sole and focused issue before the Court in this matter as stipulated and agreed by the parties prior to the August 3rd, 1998, hearing is whether the Court should exercise its discretion to hold an evidentiary hearing to determine the Debtor's tax liability related to certain real properties from the tax year 1991 through the tax year 2000. As more fully explained hereafter on the facts and circumstances of this case, the Court will not exercise its discretion under Section 505 of the Bankruptcy Code and will abstain from making the tax determination or holding the hearing related thereto as requested by the Debtor.

More specifically, before the [8] Court at this time is the Debtor's motion pursuant to Bankruptcy Code Sections 505 and 503(b)(1)(b), which requests the Court to exercise its jurisdiction under those statutes. That motion is a matter of record as Document ID Number 21.

The motion specifically seeks a hearing before this Court, the purpose of which would be to determine the

allowed claims of the City of New Haven — which I may hereafter refer to as the "City" — and First Union Bank as Trustee for the New Haven TLC Trust 1995-1, (inaudible) Capital Investment Corporation, and any other purchasers of tax liens — I may hereafter refer to them as the "Tax Lien Purchasers" — for and in connection with real property taxes and any claimed interest or penalties arising out of or relating to the Debtor's real property known as 1496, 1500, and 1508-1510 (inaudible) Ella Grasso Boulevard — I may hereafter refer to that property, those properties, as the Ella, the "Grasso Boulevard Properties — and 503-505, 507-509, 511-513, and 515-519 Whalley Avenue, New [9] Haven, Connecticut. I may hereafter refer to those as the "Whalley Avenue Properties."

Those properties will be collectively referred to hereafter or may be collectively referred to hereafter as the "Real Properties."

Those Real Properties consist of approximately twenty dwelling units in five multi-family and two single-family buildings. These properties are, as I will indicate in more detail hereafter, the only real property of this Bankruptcy Estate and, in fact, represent all of the property of the Bankruptcy Estate.

The Debtor asserts that this Court should exercise its discretion and determine the tax liability of this Estate to the City and the Tax Lien Purchasers, thereby clearing away the principal obstacle to what it alleges would be the successful conclusion of this Chapter 11 case. That conclusion would include the confirmation of a Plan of

Reorganization on terms the Debtor alleges to be favorable to all of its creditors.

Parenthetically, I would [10] observe that those offered terms include paying all allowed unsecured claims in full.

Specifically, the Debtor requests that the Court hold an evidentiary hearing and fix the allowed claim of the City and the Tax Lien Purchasers for all of the real property taxes assessed against the Real Properties for the tax years 1991 through 1995 at no more than $63,162.86 and disallow any such tax and other claims to the extent such exceeds that amount.

Parenthetically, the Court notes that the 1990 to 1993 taxes combined with the 1994 tax claims total approximately $222,000.

In the motion, the Debtor further requests the Court to fix post-petition taxes for the tax years 1996 through the year 2000 at the 1996 tax year level.

The City of New Haven has an interest in this matter as the determination of assessment values and the resulting determination of the taxes owed thereby will directly affect its revenue status. The Tax [11] Lien Purchasers have an interest in this case as a secured creditor by virtue of an assignment of the tax liens by the City.

These responding parties files written objections to the Debtor's motion — see Document ID Numbers 29 and 47 — and all parties were heard at oral argument held on August 3rd of 1998.

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The facts necessary for this Court to resolve the question of abstention are either agreed undisputed or cannot be disputed as they are a matter of record. These facts and the inferences I draw therefrom include but are not necessarily limited to the following:

The City of New Haven performed its last decennial real property reevaluation in 1991. The Debtor or its predecessor — and I insert as the Debtor, as I will later indicate, was formed several days prior to the filing of the bankruptcy petition — was notified, the Debtor or its predecessors, were notified or was notified of the amount of the assessment or the amount of the taxes assessed as a result of that [12] reevaluation each year since 1991, and as the Debtor acknowledges, the Debtor never protested the City's 1991 property evaluations and assessments by means of a statutory tax appeal in Connecticut.

The Court, of course, assumes and does not have to assume because it can find from the files and records of the case that it was neither the Debtor nor its predecessor that did not protest the 1991 property valuation and assessments resulting therefrom. See generally Document ID Number 50 at page 2.

As a result, the taxes became final, and the liens were placed against the Real Properties, or liens were placed against the Real Properties. No taxes have been paid on the Real Properties since 1991. The first, quote, "challenge," end quote, to these taxes or the amount thereof followed the filing on September 13, 1996, by the Debtor of New Haven Projects, Limited Liability Company, of a voluntary petition

under Chapter 11 of Title 11 in the Southern District of New York.

[13] The petition — see Exhibit 1 — references I make to exhibits are the references to exhibit numbers submitted in this case in connection with the August 3, 1998, hearing, unless I otherwise indicate.

The petition listed the Debtor's address as 452 East 87th Street, New York City. The case originally filed in the Southern District of New York was transferred to the District of Connecticut by order of the United States Bankruptcy Court for that Southern District by order dated December 10, 1996. By motion filed on February 23, 1997 — see specifically Document ID Number 7 — and by order related thereto — see Document ID Number 8 — Gregory L. Maidman was authorized to represent the Debtor as a Visiting Lawyer pursuant to our Local Rules of Civil Procedure, specifically Local Rule Number 2.

In the motion and supporting affidavit — Document ID Number 7 — of Gregory L. Maidman, it was represented therein that he practices law with the law firm of Maidman and Mittelman at 432 East 8th [14] Street, New York City. It appears that he practices law with Eugene Mittelman and hell A. Maidman, with Richard H. Maidman being, quote, "of counsel," end quote, to the firm. See generally the letterhead associated with the stipulation dated July 21, 1998, filed on July 27, 1998, and in making reference to that letter, the Court is obviously cognizant of the fact that it lists the address of Maidman and Mittelman as 35 East 63rd Street, New York City, and bears a different telephone number from that in the aforementioned Maidman affidavit.

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This is one of the few references to an address associated with the Maidmans or the Debtor other than 432 East 87th Street, New York City, at least, in terms of the papers on file in this case.

In the motion —

MR. KARASIK: Hello.

THE COURT: What happens here is if I either shuffle — Mr. Karasik, if I shuffle a paper or if I pause, it may sound like I'm disconnected from you.

MR. KARASIK: Okay, hold on.

[15] THE COURT: Unless you hear a disconnect for longer than ten seconds, we're still here.

MR. KARASIK: Okay.

THE COURT: The Debtor was formed on September 11, 1996 — see Exhibit 3 — that date being two days prior to the filing of the Chapter 11 petition.

The Ella Grasso Boulevard and Whalley Avenue Real Properties, the Real Properties, were represented by the Debtor to be the Debtor's, quote, "substantial," end quote, assets. See the Local Rule 1007-2 affidavit at paragraph 14 submitted as Exhibit B to Exhibit 1.

The Court finds that those Real Properties represent all of the — for all intents and purposes, all of the property of

the Debtor. See Schedule A. See also Schedule B listing a minus $7,000, plus-or-minus, as the only other property.

The Real Properties were transferred to the Debtor on September 12, 1996, that is, the next day, and the day prior to the filing of the Chapter 11 [16] petition, the transferor being New Haven Projects Associates Limited Partnership by New Haven Projects Number One Corporation.

New Haven Projects Associates Limited Partnership is the Debtor's predecessor — see Local Rule 1007 affidavit at paragraph 15 — and the other General Partner of the Debtor, whose other General Partner is Richard H. Maidman — with an address of record as 432 East 87th Street. See Exhibit 7.

The members of the Debtor, that is, the members of New Haven Projects Limited Liability Company, with the power to vote 100 percent of its membership interests, are New Haven Surplus Limited Liability Company, an entity formed on or about July 14, 1995, under the laws of the State of Connecticut, with an address of its principal office at one of the Whalley Avenue properties — see Exhibit 4 — and the aforementioned New Haven Projects Number One Corporation.

At this point, it may be out of chronological sequence, but the Court [17] notes and observes that the Debtor's present real property mortgage holder, first mortgage holder, is the William Maidman Trust, a Trust controlled and operated by the Debtor's counsel and/or other members, quote, "Maidman Members," of the Debtor's counsel's law firm.

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The Debtor's counsel's response to Gregory Maidman's relationship to this Trust was like his response to the Debtor's failure to pay taxes due on its or its predecessor's properties since 1991, that it had, quote, "no bearing," end quote, on the motion and, quote, "will not be discussed," end quote. See Document ID Number 50, page 2.

In making this observation, the Court is fully cognizant that in other exhibits and papers, representatives of the Debtor specifically including Elizor Cohen, assert that Gregory Maidman's interest in the Trust is merely a beneficiary of the Trust and that he has less than a one percent beneficial interest in the Debtor. In that regard, see the Cohen affidavit, Elizor Cohen affidavit, filed June 22, 1998, executed on [18] June 19, 1998.

The Maidmans and/or the Maidman Trust interest, which I have discussed up to this point and will be discussed in more detail hereafter, their interest in and control of the Debtor, the Debtor's predecessors, the Debtor and the Debtor's predecessor's members, is of particular significance because of the specific asset and liability structure of the Debtor which changed during the course of time. At the time of the petition, that is, in September of 1996, the only assets, as I have mentioned, of the Debtor, were these seven pieces of property, so-called Real Property.

As I indicated, the only asset other than the Real Property scheduled by the Debtor was a negative balance of minus $7,000 in the financial account of Chase Manhattan Bank. See Schedule B filed October 10 of 1996.

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The Debtor's petition lists approximately twelve creditors. Out of those twelve creditors and depending on how one [19] counts them, they could be fourteen — I count them as twelve — seven are scheduled as unsecured creditors who will not benefit in any manner from this motion. I make that observation noting the exception that if the Court were to grant this motion and reduce the taxes to the amount requested by making the assessment in the amount asserted, the Debtor asserts it will then propose a Plan that pays these unsecured creditors in full.

The universe of the scheduled unsecured creditors has a maximum mass of $7,963.35, which even at a maximum represents approximately one half of a percent of the debt structure of the Debtor.

These scheduled unsecured creditors include three thousand on account of the attorneys representing the Debtor; $1,500 due one Michael Gordon alleged by the City of New Haven and the Tax Lien Purchasers' attorneys to be a questionable item, and the details of that claim being somewhat if not completely unknown to the attorney for the Debtor at the time of the August 3, 1998, hearing, whose response was, [20] quote, "I don't know, that's someone living in Cheshire, Connecticut," or words to that effect; $2,300, quote, "accrued but not billed," end quote, in water bills, which pursuant to Connecticut State law are arguably secured with priority over the mortgage; a claim scheduled at zero dollars for UI, presumably a de minimis electric bill; and, two remaining Schedule F unsecured creditors, those being Rotorooter for $212, and L-a-e-h-l-e Plumbing and Heating in the amount of $951.35.

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The remaining creditors are secured creditors. This is at the time of the petition.

At that time, that is, at the time of the petition, and perhaps more importantly for purposes of this motion, there existed a blanket first mortgage against all of the Real Properties in the amount of $1,100,000 in first mortgage, a blanket held by the Federal Deposit Insurance Corporation.

The total value of all of the Real Properties is substantially less than [21] this first mortgage, even if the values are reduced to those as sought in the Debtor's motion. Therefore, at the time of the petition, a Section 505 tax determination of the kind presently proposed would and would only have benefited the FDIC, that is, the Debtor's then first mortgage holder, at the expense, of course, of the City of New Haven and the Tax Lien Purchasers.

However, as previously mentioned, the William Maidman or W. M. Maidman Family Limited Partnership and William Maidman and Samuel Mittelman as Trustees for the William Maidman Trust, care of the law offices of Richard H. Maidman, 432 East 87th Street, New York City, New York, New York, acquired in early 1997 from the Federal Deposit Insurance Corporation all of its interest that it then had in the notes, mortgages, assignments of lease and rents, related to the Real Property. Therefore, it is now or presently the Maidman Trust, as the first mortgage holder, which would benefit and would benefit substantially from the requested tax adjustment.

[22] Once in the position to benefit, the Debtor on November 29, 1997, filed a motion, Document ID Number 21,

seeking to access that benefit and inter alia and simultaneously asserting that it would pay through a Chapter 11 Plan unsecured creditors, all unsecured creditors, in full.

To effect such a payment, the Debtor alleges that a settlement not disclosed in any detail has been reached with the first mortgage holder, that is, that the Debtor has reached an agreement with the Maidman Trust.

The determination of a Debtor's tax liability constitutes a court proceeding under Title 28, United States Code Section 157(b)(2)(b), and 11 U.S.C. Section 505(a)(1). The Court notes as a threshold matter that Section 505 empowers the Bankruptcy Court to determine a Debtor's tax liability provided that the merits of the tax claim have not been previously adjudicated in a contested proceeding before a court or tribunal of competent jurisdiction. See Section 505.

[23] The Court may exercise — and this is not an issue as a matter of law in this case — its power to determine tax liability regardless of whether the tax has been assessed or paid.

One policy — and, indeed, what the Court finds and what other courts have found to be one of the principal policies or purposes behind Section 505 — reflects an intent to protect creditors from a defaulting Debtor. Section 505 also provides a mechanism to ensure the prompt and orderly administration of the bankruptcy estate. Section 505 makes it clear that its purpose was to afford a forum for the ready determination of the legality or amount of the tax claims, which determination if left to other proceedings might delay

conclusion of the administration of the bankruptcy estate. See In re: Hunt, 95 Bankruptcy Reports 442 at page 444, a bankruptcy case, Northern District of Texas, 1989.

If the Debtors are to have a meaningful reorganization plan that fulfills the reorganization requirement, prompt [24] resolution of tax claims is essential. Having the Bankruptcy Court adjudicate the matter may also afford an alternative forum for proceedings that might otherwise delay the orderly administration of the case and distribution to the Debtor's creditors. See Onandaga Plaza Maintenance Company, Inc., 206 Bankruptcy Reports 653 at 656, Northern District of New York, 1997.

The Court's authority, however, under Section 505 is clearly discretionary, and as the court in Onandaga Plaza observed with reference to In re: D'Alessio, 181 Bankruptcy Reports 756 to 760, Southern District of New York, 1995, the reference to Onandaga being page 656, quote, "Congress never intended to create a second tax adjudication system in enacting Code Section 505. Therefore, it is incumbent upon the Court to assure itself that the legislative purpose for drafting this provision, namely, to protect the interests of both Debtors and Creditors, is met. Creditors are entitled to protection from the dissipation of an estate's assets in the [25] event that the Debtor failed to contest the legality and amount of taxes assessed against it." End quote.

In determining whether to exercise the discretion, the Bankruptcy Judge is required to examine the issue case by case. The analysis necessarily includes weighing a number of factors including the complexity of the tax issues to be

decided, the asset and liability structure of the Debtor, the length of time required for the trial and decision, judicial economy and efficiency, the burden on the Bankruptcy Court's docket, prejudice to the Debtor, potential prejudice to the taxing authority, and other factors which may appear in the context of any given case. See the aforementioned cases, Hunt at page 445, Onandaga at page 657, and In re: D'Alesio at 759-60.

In this particular case, similar to the Onandaga case, there is simply nothing that is complex about the determination of the value of the properties for assessment purposes. The City of New [26] Haven and First Union have argued that the Debtor's motion presents complicated tax and valuation questions compounded by the necessity to determine assessed values with regard to each of the seven different Real Properties in question.

The requisite testimony they allege will take a substantial amount of time to present, and because, quote, "The Court will require time to familiarize itself with the relevant statutes," end quote, it will, quote, "take a substantial amount of time to render a decision." End quote. See pages 4 and 5, Document ID Number 29.

At the August 3, 1998, hearing, however, it was acknowledged that a hearing could be accomplished in one or two days and such a hearing could be held as early as the latter part of September, 1998. Neither the length of time required for trial and decision, other considerations of judicial economy and efficiency, or the related consideration that the burden on this Court's already and otherwise overburdened

docket weigh against or require abstention [27] from hearing this motion.

A real estate evaluation of seven pieces of property, which the Court views could be subdivided into two groups with some efficiency, would not be in this Court's view complex or prolonged. Rather, like the matter confronted by the Court in Onandaga and other cases, it is the peculiar or particular asset and liability structure of the Debtor and, in this case, its relative, the Maidman Trust, which is of concern to the Court.

With regard to those unsecured creditors, there are no unsecured creditors awaiting for the distribution to the Debtor who are not affiliated or otherwise connected to the Debtor, or it might be more precise to say that the unsecured creditor universe is extremely small and de minimis.

Under those circumstances and similar circumstances, courts have generally abstained from reviewing tax disputes.

That reference came from a reference to the Onandaga case, and I'm sorry. I don't have a page reference for you [28] there.

This case, as I will mention shortly, involves essentially and only the Debtor, the mortgage holders, and the either taxing authorities or Tax Lien Purchasers. Therefore, unsecured creditors will not benefit from a determination, pure unsecured creditors will not benefit from a determination in the Debtor's favor.

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Quote, "When the intended beneficiaries of the remedy in question will realize no particular benefit from its use, much of the rationale for its employment disappears and with it this Court's willingness to exercise discretion afforded by the statue." End quote. See In re: Swan 152 Bankruptcy Reports 28 at page 30, Western District of New York, 1992, citing other cases therein.

Section 505 of the Bankruptcy Code which vests authority in the Bankruptcy Court to make determinations at to tax liability does not provide, nor was it intended to provide, review of a claim or matter previously contested before and [29] adjudicated by a tribunal of competent jurisdiction. See 505(a)(2)(a). Nor does it provide was it intended to provide Bankruptcy Court review of a claim or a matter which could have been adjudicated in the non-bankruptcy forum or before a non-bankruptcy tribunal pre-petition but was not by the failure of the party — in this case, the Debtor or its predecessors controlled by the same entities — where such failure was not the product of a mistake and where it is the Debtor who will benefit, or the Debtor's affiliates, insiders or related controlling entities.

Such a circumstance in the context of Section 505, amongst other things, would provide the taxpayer, now Debtor, with an incentive to ignore established procedural vehicles to timely resolve tax disputes before non-bankruptcy forums, to fail to pay taxes, as is the case here for eight years, and then to seek review in the Bankruptcy Court, as is the case here, many years later.

Implicit in this observation and connected to it is a finding that I now [30] make explicit at this time, and that is

that it's the Court's view that the Maidmans and the Maidman Trusts are controlling entities of the Debtor and its predecessors. Counsel orally argued that the Trustees of the current first mortgage holders are not, quote, "insiders of the Debtor and that the Respondents," that is, the City of New Haven and the Tax Lien Purchases, "have not established that this or any other party is an affiliate or insider or otherwise related to the Debtor."

It is transparently obvious to this Court that the Maidmans and/or the Maidman Trust control the Debtor, its members, controlled the Debtor's predecessors and its members, and have exercised full and complete control over those entities since their inception; they, that is, the Maidmans and the Maidman Trusts, and through that vehicle, their hand and footprints are found throughout and all over these entities. They formed and controlled the Debtor's predecessor; they formed and controlled the Debtor's members or they are the Debtor's [31] members. They could have contested and/or appealed through their control of the predecessors the decision, the tax assessment made in 1991, but they did not. They chose not to pay any taxes from 1991 to the present date.

They, through the exercise of that control, created the Debtor itself. The next day, the day following the creation of the Debtor, they provided the Debtor or facilitated the provision to the Debtor of all of its assets including specifically the Real Properties in this case.

The second day later, or the next day after the Debtor received the properties, by obvious plan and design, they

caused the Debtor to file in the Southern District of New York the bankruptcy petition transferred by that Court to Connecticut.

They, that is, the Maidman Trust, bought out the first mortgage holder in a transaction, the details of which are unknown to the Court and were not provided to the Court but obviously involve a discount and presumably a deep discount for such [32] purchase. They then agreed, again, in details that have not been provided to the Court and are unknown to the Court, as to the resolution of the first mortgage lien with the Debtor.

They then caused by virtue of their control a 505 motion to be filed with this Court whose obvious purpose was to seek to advantage themselves of the monetary benefit that would flow from the granting of that motion and which the Court finds would create a six-figure windfall to the Debtor, to the Debtor's affiliates, insiders, and to the related controlling parties and entities which I referred to as the Maidmans and the Maidman Trust.

This windfall would be at the clear expense and to the clear prejudice of the City of New Haven and to the Tax Lien Purchasers.

It would be without meaningful impact on unsecured creditors.

Adjudicating the 1991 dicennial tax assessment would not facilitate or expedite any meaningful distribution to [33] unsecured creditors and, therefore, would not advance, A,

what certainly must be conceded to be one of the primary purposes underlying the enactment of Section 505.

With regard to the Debtor's interest which must be considered and which the Court does consider, what the Debtor is requesting in this case is similar to what was referred to in the Swan case at page 30, a quote, "second bite of the apple," end quote, which would only benefit the Debtor and affiliates and insiders and the real controlling interest, the Maidmans and the Maidman Trust.

That benefit, as I previously observed, would be an inappropriate windfall at great expense to the City and to the Tax Lien Purchasers.

The motion not only does not advance the primary purpose or what the Court views to be the primary purpose underlying the enactment of Section 505, it serves no purpose contemplated by Section 505 and, indeed, in this Court's views, defies the spirit of that statute and visits undue [34] prejudice on the responding parties.

The Court, accordingly, declines to exercise its equitable discretion under Section 505 and abstains from engaging in a hearing for the purpose of determining the tax — the Debtor's tax liability in connection with the Real Properties.

An appropriate order will enter, written order, which will incorporate by reference the Court's oral remarks of record today, will enter later today.

All right. Unless there is something that is central and needs to be discussed in connection with the Court's ruling,

the Court is going to stand in recess in connection with this case.

MR. KARASIK: Thank you very much, your Honor.

THE COURT: All right. Court is in recess.

VOICES: Thank you, your Honor.

(End of tape recording)

* * * *